

# THE INTERNATIONAL ECONOMIC LAW REVOLUTION

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## 1. INTRODUCTION

With the change in name of this journal, the Law School of the University of Pennsylvania might appear to some to be taking a step backward, away from business. This step might appear strange at a time when the world seems to have come to a consensus that business — economic organization in the form of the market or the firm — should be central to economic organization. The central position of business should not be confused with an exclusive position, however. As economic organization includes more than business, this change in name really is a step toward a broader field rather than a step away from business. More importantly, it is a step toward a more nuanced perspective on international law and toward a more mature perspective on the role of business in domestic and international society. It is a step toward recognizing that there are markets beyond the private market for goods and services, and that these additional markets and accompanying institutions merit closer study. These other relevant markets include the market among governments for trade and regulatory concessions. Institutions beyond the firm and the state also merit closer study.

I begin this essay with an examination of four associated fields of legal study: private international law, international business law, international economic law, and public international law. I make four related arguments. While none of these points is wholly novel, my goal is to show their common underpinnings and their interrelation as the foundation for a new, cosmopolitan perspective which may be used to understand and manage the

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international economic law revolution. These first four points are simply intended to establish the broad parameters of international economic law. After I have established these parameters, I turn to the question of the importance of international economic law, and of its relation to other areas of economic regulation. I then describe the role of international economic law as a central forum for mediating between national and international and public and private law.

First, I observe that economics includes, and dominates, business. Therefore, as noted above, the change in name of this journal is quite appropriate, as international economic law encompasses international business law, including relevant portions of the topic known as "private international law." Economics is a public policy science that, in its normative form, evaluates the design of institutions for the organization of economic activity.<sup>1</sup> This perspective recognizes that the realm of business — the so-called "free" market and its main denizen, the firm — is a social construct susceptible to this evaluation and compatible with this design. The use of the term "economics" recognizes the contingency of business and recognizes that the inclusion of markets and firms is a question of institutional design rather than a fact of nature. We must decide continually, as a national or as an international society, where this design fulfills our needs better than others.

Second, partially as a corollary to the first point, I note the emptiness of the category "private international law." Private international law is not separate from public international law. As many realists and critical legal theorists long ago pointed out, "private law" is an oxymoron. Rather, the important underlying issue is that there are at least two kinds of persons subject to law: private persons and states. The two types of applicable law may be quite different.

The third point follows from the second. That is, the very term "international law" must be revisited and reevaluated, as the

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<sup>1</sup> I refer here to a more institutional form of economics. Most economists today focus only on the market, and pay little regard to its legal and institutional underpinnings. "They have become preoccupied with predicting the effects of exogenous changes on the observable and measurable aspects of market outcomes (price, wage rates, quantities, etc.) and with elaborating the logical implications of alternative assumptions (or alternative 'models')." GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* x (1985).

system of law that governs international relations has both states and individuals as its subjects and objects.<sup>2</sup> Increasingly, "international law" is taken to mean "transnational law," the term coined by Philip Jessup, the late judge of the International Court of Justice, to include in the scope of study private law and other municipal law that affects relations between different countries and their peoples.<sup>3</sup> This is the integrated body of domestic and international law that regulates both private persons and states, competition in both the market for private goods and the market for public goods. Regulation of competition in the market for public goods naturally has an effect in the market for private goods. As long as international law and transnational law are taken to mean the same thing, there is no need to change the name of this journal again, to refer to "transnational law." No one would argue, however, that the subject matter of this journal should be limited to treaties and customary international law, or law between states. Rather, it should include outward- and inward-regarding domestic law because this domestic law affects relations between different countries and between people in different countries. Whether to choose domestic or international law to respond to particular issues is again a choice of institutional design. Do we achieve more by cooperating, and if so, how can we cooperate best?

Fourth, I note that international economic law and public international law are not separate categories;<sup>4</sup> rather, international

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<sup>2</sup> See generally Mark W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984).

<sup>3</sup> See PHILIP C. JESSUP, *TRANSNATIONAL LAW* 1-2 (1956); see also HENRY STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS* (1994). Alternative terms include "law of nations," as proposed by Mark W. Janis, *International Law?*, 32 HARV. INT'L L.J. 363, 371 (1991), and "world law," as proposed by Harold Berman, *The Role of International Law in the Twenty-first Century: World Law*, 18 FORDHAM INT'L L.J. 1617, 1617 (1995). I believe that "international law" will continue to undergo a change in meaning that will make it equivalent to, or inclusive of, these other concepts. The word "international," as originally coined by Bentham, describes fewer and fewer real world circumstances, and is increasingly used to connote much more than "inter-national" relations. See Mark W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405, 405-18 (1984). It will thus prove durable.

<sup>4</sup> See, e.g., John H. Jackson, *International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 AM. U. J. INT'L L. & POL'Y 595, 596 (1995) (speculating that as much as 90% of public international law is international economic law).

economic law simply refers to a type of "public" international law that has economic goals.<sup>5</sup> In fact, economic integration is the leading motivation for new public international law today, and the most fertile source of new legislation and constitutionalization in international law. International economic law comprises a new or expanded set of legislative fields for international law to address. Indeed, international economic law is the leading engine for revising the *domaine réservé* of traditional public international law, the unquestioned margin of deference accorded the state. Perhaps most importantly, international economic law provides the functional basis for a new era of international constitutionalization.<sup>6</sup> In this regard, traditional public international law serves as the default constitutional structure on which we build through constitution-like treaties.<sup>7</sup> International economic goals motivate positive legislation of constitutional and legislative rules. In addition, there may be a spillover effect from the economic to the political; this was a conscious strategy of Jean Monnet and Robert Schuman in designing the European Economic Community.

I refer to the opening of this new era of international legislation and constitutionalization as the "international economic law revolution." This revolution allows us to see our world as a

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<sup>5</sup> In fact, while it is not necessary to my argument, this argument may be extended to hold that economics also dominates politics: Politics is one category of institutional technique for social decisionmaking, and economics includes both this category and, for example, the categories that we have come to speak of as the market and as the firm. The public choice technique of applying economic analysis to political issues is based on this proposition. For a discussion of the application of public choice theory to international economic law, see Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745 (1995).

<sup>6</sup> For a chronicle of the constitutionalization of the Treaty of Rome, see Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991). There is, of course, a relationship between the scope of subject matter addressed at the international level and the institutions provided to address it, as described by Weiler. John Jackson has called for further study of the "constitutional" underpinnings of international economic law. See Jackson, *supra* note 4, at 606.

<sup>7</sup> By "constitution-like treaties," I mean treaties that establish bases for further legislation and adjudication. These are treaties that do more than simply create substantive rules for application, but create a method, beyond mere intergovernmentalism, for creating further substantive rules either through legislation or adjudication. The example *par excellence* is the Treaty of Rome, Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 87. See generally Weiler, *supra* note 6.

single system, both geographically and functionally. If the law is a seamless web, we must recognize and manage the complex and subtle relationships between different countries' laws, and between different areas of public policy, such as trade and the environment. Because decisions taken by people in one country affect people in other countries, and decisions taken in one functional area affect policy in other functional areas, we must determine to what extent and how policy formation processes can be integrated.

This new era is revolutionary because it changes the underlying assumptions of international law regarding the *domaine réservé*; regarding the need for, possibilities for, and structure of international legislation; regarding the role of international adjudication; and regarding an international legal "constitution." It is revolutionary because it has revealed the contingency of our public international law institutions. After germinating in the European Economic Community, the revolution has spread as the European Union spreads and as its principles of free trade and multilateralism are adopted in other regions and in the multilateral system.<sup>8</sup> The revolution in international law recognizes a greatly increased scope of possible institutions from which to choose in organizing international society.

## 2. INTERNATIONAL BUSINESS LAW AND INTERNATIONAL ECONOMIC LAW

Economics is often associated with the allocation of social capital through markets. While economics usually is defined as the study of market-based activity, it increasingly has turned its attention and analytical techniques to spheres not typically considered to be markets, such as marriage, child-rearing,<sup>9</sup> and crime. As the domain of economics is expanded to encompass nonmarket forms of economic organization, such as the family, firm, or state as units of organization, economics emerges as a broad science of choice of organizational form, a leading example of which is the market itself. What, then, is business? Perhaps business is the pragmatic implementation of this science of choice

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<sup>8</sup> But see David Kennedy, *Receiving the International*, 10 CONN. J. INT'L L. 1 (1994) (describing a critique of the European Union).

<sup>9</sup> See GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); see also Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53 (1985).

to exploit markets. Business includes sales, marketing, accounting and human relations, topics conventionally excluded from economics.<sup>10</sup> The perspective of economics is often that of the government, which is assumed to act as optimizer for the aggregate of society rather than for the individual or firm. Business analysis, on the other hand, often takes the perspective of the individual or firm. Neoclassical economics has been criticized by the new institutional economics for failing to encompass this perspective and use it to inform its analysis.<sup>11</sup>

A related purported distinction between international business law and international economic law is the distinction between transactions and trade. Transactions, in this sense, are between private persons (or public persons treated more or less as private persons), while trade is a matter of public policy and mercantilism or protectionism. The distinction is one between levels of analysis. Analysis at the individual or firm level of economic organization is transactional, while analysis at the state or higher level is economic. Because the substantive body of law governing the individual is still predominantly domestic, this distinction implicates the domestic-international dichotomy. A series of related diads might thus include: (i) business: economics, (ii) transactions: trade, (iii) domestic: international, and, as more fully set forth below, (iv) private: public. A final diad that is also related, although less clearly and more contentiously, is (v) rule-oriented: power-oriented.

None of these diads is a dichotomy. From a curricular

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<sup>10</sup> On the other hand, all of these business activities play an important microeconomic role. For example, an economics analysis of transaction costs might find that marketing plays an important role in reducing the transaction costs of obtaining information regarding products or services, and that accounting facilitates analysis and communication both within and without the firm.

<sup>11</sup> This criticism has been made by the so-called new institutional economics. See generally THRAIN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS: PRINCIPLES OF NEO-INSTITUTIONAL ECONOMICS* (1990); Bruno S. Frey, *Institutions Matter: The Comparative Analysis of Institutions*, 34 EUR. ECON. REV. 443 (1990); Steven G. Medema, *Discourse and the Institutional Approach to Law and Economics*, 2 J. ECON. ISSUES 417 (1989); Douglass C. North, *Institutions, Transaction Costs and Economic Growth*, 25 ECON. INQUIRY 419 (1987); Douglass North, *The New Institutional Economics*, 142 J. INST. & THEORETICAL ECON. 230 (1986); Richard A. Posner, *The New Institutional Economics Meets Law and Economics*, 149 J. INST. & THEORETICAL ECON. 73 (1993); Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 ADMIN. SCI. Q. 219 (1994).

standpoint, a course in “international business transactions” involves sales of goods, licensing of intellectual property, and foreign direct investment, but might not include an investigation of the *legality* (as opposed to the simple application) of tariff and nontariff barriers that affect these transactions. From a pragmatic business standpoint, however, as well as from the standpoint of economic theory, these issues are inseparable.<sup>12</sup> They are made inseparable because of the interdependence between domestic law and international law. Thus, the business person may use international law as a basis to attack adverse domestic law. International law may or may not be directly applicable to require the nonapplication of inconsistent domestic law. Even if it is not applicable by courts, it may form the basis for a favorable interpretation of domestic law, or for a political attack on an adverse domestic law.

Sales cannot be made without considering tariff and nontariff barriers to export transactions and their international legality. Intellectual property cannot be licensed without considering local laws protecting intellectual property, which have been recognized in the Uruguay Round to be importantly related to trade, and which are disciplined under the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Good (“TRIPs”). Foreign investment decisions cannot be made separately from issues of tariffs, antidumping duties, and rules of origin, and from issues of protection against mistreatment that may be possible, for example, under bilateral investment treaties. Of course, from a pedagogical standpoint, it may make sense to separate the contract, commercial law, conflict of laws, and other private dispute resolution issues, which share some common themes, from trade law issues, which relate more to competition, especially competition among states, as opposed to private persons. From a practical and theoretical standpoint, however, it must be recognized that transactions and trade are inseparable.

Finally, the distinction between business and economics, between international business law and international economic

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<sup>12</sup> See Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, in ECONOMIC ANALYSIS OF INTERNATIONAL LAW (Jagdeep Bhandari & Alan Sykes eds., forthcoming 1996).

law, may be viewed as a distinction between private and public.

### 3. THE DISAPPEARANCE OF PRIVATE INTERNATIONAL LAW

All law is public.<sup>13</sup> While the type of law called private law regulates relationships between private persons, it has a public purpose and is constructed therefor: "There was nothing natural about *laissez-faire*."<sup>14</sup> If there is no private law, there can be no private international law. The topic of private international law traditionally encompasses the range of legal issues arising from the fact that private relations cross jurisdictional boundaries, and different jurisdictions implicate different legal systems. The topic of "conflict of laws" includes such issues within a divided domestic system, as well as private international law in the international system.<sup>15</sup> The central issue in conflict of laws and within private international law, however, is a fundamental issue of state authority; namely, which state will be allocated the legal power to regulate the matter? The proposition that all law is public indicates that all conflict of laws issues are issues of allocation of public power.<sup>16</sup> The question of allocation of public power is also the fundamental question of public international law. It

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<sup>13</sup> This insight has been attributed to Lenin. For further discussion of the distinction between public and private law, see JOHN HAZARD, *COMMUNISTS AND THEIR LAW* 77 (1969); Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986); Kenneth M. Casebeer, *Toward A Critical Jurisprudence — A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987); Morton S. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); L. Harold Levinson, *The Public Law/Private Law Distinction in the Courts*, 57 GEO. WASH. L. REV. 1579 (1989); John H. Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUBLIC L. 3, 13 (1968); Roscoe Pound, *Public Law and Private Law*, 24 CORNELL L. Q. 469 (1939); John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561 (1952).

<sup>14</sup> KARL POLANYI, *THE GREAT TRANSFORMATION* 139 (1944).

<sup>15</sup> See, e.g., Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CAL. L. REV. 1599 (1966) (exploring the differences in policy between interstate and international conflict of law cases).

<sup>16</sup> This proposition is not new, although it is not universally accepted. William Baxter said of Brainerd Currie: "[a]s his own analysis effectively shows, the process of resolving choice cases is necessarily one of allocating spheres of legal control among states." William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 22 (1963).



arises whether we are speaking of legislative jurisdiction, adjudicative jurisdiction, or jurisdiction to enforce. It is a question of horizontal and vertical intergovernmental relations.

Thus, private international law is not so much isolated from as it is absorbed by public international law.<sup>17</sup> The problem with this absorption is a problem with public international law's arid failure to address the public policy issues implicated in the claims and interests of private persons.<sup>18</sup> This failure has been rooted in the absence of a mechanism for active legislation and the incorporation of democratic values in legislation in the international legal sphere. As noted below, the international economic law revolution is rapidly revealing the need for mechanisms for active legislation and the incorporation of appropriate democratic values which must precede such legislation. Perhaps the failure is more deeply rooted in the absence of a strong motivation for public international legislation, other than in limited areas such as the laws of war. While we rightly bemoan human rights violations and failures of democratic politics in other countries, we are unable to accept reciprocal incursions on our own autonomy. In the low politics of trade and business regulation, restrictions on autonomy, or sovereignty, often seem less threatening.

While the distinction between private and public may bear little weight, there is another distinction implicit in the separation of private international law from public international law. The latter distinction relates to the persons who are subjects and objects of the law, and to the direct effect of the law on private persons.<sup>19</sup> In this sense, private international law governs the

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<sup>17</sup> See Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149, 152 (1988). Paul recognizes the inseparability of private international law and public international law. He criticizes the isolation of private international law from public policy concerns, a criticism echoed by the current author. See *id.* at 171.

<sup>18</sup> See generally Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991).

<sup>19</sup> See generally NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993); UNITED KINGDOM NATIONAL COMMITTEE OF COMPARATIVE LAW, THE EFFECT OF TREATIES IN DOMESTIC LAW (Francis G. Jacobs & Shelley Roberts eds., 1987); Frederick M. Abbott, *Regional Integration Mechanisms in the Law of the United States: Starting Over*, 1 IND. J. GLOBAL LEGAL STUD. 155 (1993); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992).

relations of private persons in connection with property, contracts, civil wrongs, and a host of other issues in which private persons relate directly to one another. Governments increasingly recognize, however, that private relationships are public policy issues and, on the international plane, espouse in one form or another the claims or interests of private persons. They also engage in efforts to unify or otherwise organize the world of "private law" in order to facilitate business. They often do so through public international law techniques, including entry into treaties. Of course, private persons may have obligations as well as rights. Rights or obligations may arise either directly by virtue of the treaty or customary international law, or indirectly by an act of transformation.

The question of whether a particular international legal rule binds and benefits only the state or also binds and benefits private persons subject to the jurisdiction of the state (where it is not determined by national constitution) is first a question of intent as expressed in the legal rule: did the legislature intend to affect the rights or duties of private persons? The policy bases for doing so may vary in different contexts,<sup>20</sup> but a central issue in this question of direct effect, or of self-executing nature, is the issue of integrity and uniformity of implementation. It is an issue of the bindingness of the international legal rule.

International economic lawyers know, perhaps better than public international lawyers and critics of public international law, that absolute binding power is not always good for a legal system and that rigidity can equal brittleness while flexibility may add durability.<sup>21</sup> Insufficient binding power may raise significant problems, however, including the risk of defection. The risk of defection may deter agreement in the first place, or may precipitate pre-emptive defection or inappropriate unilateral action to address alleged defection.

Thus, to the extent that private international law has been the

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<sup>20</sup> See Brilmayer, *supra* note 18.

<sup>21</sup> "Seithenyn rejects the criticism that there are weak spots in his seawall, saying: 'That is the beauty of it. Some parts of it are rotten and some parts of it are sound. . . . If it were all sound it would break by its own obstinate stiffness: the soundness is checked by the rottenness, and the stiffness is balanced by the elasticity.'" THOMAS LOVE PEACOCK, *THE MISFORTUNES OF ELPHIN AND RHODODAPHNE* 13 (1897), *quoted in* William Diebold, *From the ITO to GATT — and Back?* (1994) (unpublished manuscript, on file with author).

type of international law enforced without question by domestic courts backed by the full authority of the state, we might say that it has been the more serious brand of international law, the one skeptics cannot question. This strength of private international law has been derived from the institutional support provided to private international law due to its status, generally, as domestic law. I argue below that support from legislative and adjudicative institutions is critical to the international economic law revolution.<sup>22</sup>

There is no natural condition for law; different levels of binding power are appropriate in different circumstances.<sup>23</sup> While there is great descriptive utility to John Jackson's "power-oriented" versus "rule-oriented" dichotomy,<sup>24</sup> a post-modernist might argue that this dichotomy is normatively indeterminate. The flow of human history is not uni-directional toward strongly enforceable legal rules. Rather, we use rules of different binding force for different reasons at different times. In fact, a Marxist and a Chicago School adherent might agree that law should wither away as either socialism develops or transaction costs are reduced, respectively. If this were true, one might expect legal rules to become less binding over time. On the other hand, there is growth. It comes in the form of an expanded range of options, from less binding force to greater binding force. As more rule-oriented institutions become available, they seem useful to address some problems and are in fact used. There remain, however, circumstances that seem to call for reduced binding force.

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<sup>22</sup> Of course, one weakness of private international law has been its disunity: If the legislatures and courts of each state apply their own private international law, each state's private international law will be different, with possibilities for excessive research and compliance costs, and with possibilities for inappropriate externalization through law that operates to the disadvantage of foreign persons.

<sup>23</sup> But see Pierre Pescatore, *The Doctrine of Direct Effect: An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983).

<sup>24</sup> See generally JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 85-88 (1989); see also Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1 COLUM. BUS. L. REV. 111 (1992); Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31 (1992); Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016 (1985).

#### 4. THE COMPLEXITY OF INTERNATIONAL BUSINESS LAW: COMPARATIVE LAW, INTER-DOMESTIC LAW, CONFLICTS OF LAW, AND TRANSNATIONAL LAW

Coinciding with the disappearance of private international law and its absence from most law school curricula has been the rise of the subject of international business law, often taught in a course entitled "international business transactions," but sometimes taught in a course entitled "international trade law." This subject has little conventional theoretical coherence, but represents a range of subjects that arise in connection with international business. At the core of this subject is conflicts of law in the international setting: private international law as it pertains to business issues. International business transactions also includes, however, certain outward-regarding domestic law, such as the U.S. Foreign Corrupt Practices Act<sup>25</sup> and the U.S. Foreign Sovereign Immunities Act,<sup>26</sup> or regulation of incoming foreign direct investment or of licensing of "foreign" intellectual property. Of course, the principal component of "international" business law is simply comparative law, in a broad sense, dealing with the application of inward-regarding domestic law to international business. From a business standpoint, comparative law inquires what the legal and regulatory environment will be in a foreign country. How will differences affect investment decisions and business strategy? This comparative exercise includes virtually all areas of business law and regulation, from contract law to labor law and tax.

In addition to this "inter-domestic" law, there is a small corpus of public international law that regulates or affects international business transactions. This includes certain treaties, such as the U.N. Convention on Contracts for the International Sale of Goods<sup>27</sup> and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>28</sup> There is little in the way of traditionally conceived customary international law that

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<sup>25</sup> Foreign Corrupt Practices Act, 15 U.S.C. §§ 78a-ff (1988).

<sup>26</sup> Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11 (1992).

<sup>27</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, 19 I.L.M. 668 (entered into force Jan. 1, 1988).

<sup>28</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

regulates relations among private persons, but the *lex mercatoria*<sup>29</sup> may be viewed as a body of customary law applied by states and arbitral tribunals to relations among private persons, in some cases.

International business law, like private international law, thus may be viewed as substantially composed of domestic law, including domestic conflict of laws rules. This does not reduce its character as law, nor does it reduce its influence over international business relations. This body of transnational law merits serious study in at least three contexts. Each of these contexts may be addressed from *either* a private business policy perspective or from a public policy perspective.

First, it is necessary simply to describe differences in law. From a business or "private policy" standpoint, this represents the means of assessing the legal and regulatory environment. From a more analytical public policy standpoint, this comparative exercise can inform public policy: why do they do it differently there, and how do the differences inform our local public policy? In addition, from a public policy perspective, differences in rules may hinder international commerce without good cause.

Second, given differences in rules, overlaps or underlaps in the application of rules may represent either opportunities or problems from a private policy perspective. From a business perspective, for example, the problem of double taxation is only ameliorated by the possibility of designing structures that result in taxation by no government. From a public policy perspective, underlaps in rules may create gaps in regulation which eviscerate the regulation. Overlaps in rules may unjustifiably hinder international commerce.

Third, domestic rules may confer competitive advantages or disadvantages on firms that are subject to them, and these advantages may be a basis for firms to engage in regulatory arbitrage (private policy) and for states to engage in regulatory

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<sup>29</sup> See, e.g., Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISP. RESOL. 235 (1988); Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content and Legitimacy*, in LEX MERCATORIA AND ARBITRATION — A DISCUSSION OF THE NEW LAW MERCHANT 21-36 (Thomas E. Carbonneau ed., 1990).

competition (public policy).<sup>30</sup> Regulatory arbitrage accentuates the rewards of regulatory competition.

For these reasons, international business law merits serious study both from private and public policy perspectives. As a matter of public policy, it merits serious study as a branch of international economic public policy, or international economic law. Increasingly, it is recognized that domestic regulation of business is within the domain of international economic law. International economic law addresses some of these concerns by promoting cooperation among states and limiting competition. In order to achieve these goals, states may agree on:

- rules of jurisdiction,
- rules of treatment such as national treatment or most favored nation treatment,
- rules of proportionality of national law,
- rules of (sometimes mutual) recognition of foreign regulation,
- harmonization of law, or
- institutions that will, legislatively or adjudicatively, effect these tasks in the future.<sup>31</sup>

States need motivations to make these types of agreements. Motivations may include reduction of regulatory barriers to trade, avoidance of adverse externalization, greater efficiency in the application of regulation, and limitation of competition in regulation (avoidance of a "race to the bottom"). All of these motivations arise from cross-border economic activity, or trade.

##### 5. THE FUNCTIONAL ALLURE OF INTERNATIONAL ECONOMIC LAW

International economic law is most visible in the European Union and in the GATT/WTO systems, although it is growing in other regional organizations and in multilateral or plurilateral

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<sup>30</sup> See, e.g., Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993).

<sup>31</sup> See, e.g., Joel P. Trachtman, *Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis*, 34 COLUM. J. TRANSNAT'L L. 37 (1996).

organizations with sectoral responsibilities. The European Union's design and history have been marked by a functionalist approach. This functionalism asks: what do we need to do today, and how will we do it? It purports to eschew idealism — including one-worldism or world federalism — rolls up its sleeves, and sets about pragmatic tasks to address concrete, mostly economic, needs. This functionalism in the European Union and in the GATT/WTO system is aligned with the cosmopolitan perspective described by David Kennedy as exemplified by the work of John Jackson: pragmatic, modest and shy of its own idealism.<sup>32</sup> This cosmopolitan perspective is contrasted by Kennedy with the “metropolitan” perspective of Hans Kelsen: also pragmatic, but building idealistic public international law “arks” without relation to specific needs on the ground.<sup>33</sup>

### 5.1. *The Constitutional Function of Public International Law*

The Peace of Westphalia<sup>34</sup> crystallized a limited and rigid set of possibilities for international institutional design. The so-called Westphalian system served as the basis for an international law of “rugged individualist” states, neither pooling sovereignty nor, in theory, making incursions on the sovereignty of states. The substantive rules of this international law were dependent upon individual consent by states,<sup>35</sup> and hostile to derogations of sovereignty, construing them narrowly wherever purported to be made. Although the Westphalian system accepts treaty rules and customary rules, it has been reluctant to accept more organic types of institutions that would have the capacity to make rules without consent. Indeed, there has been and still is significant political opposition to derogation of sovereignty along these lines.<sup>36</sup>

Generally, the Westphalian system provided limited options

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<sup>32</sup> See David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 10.

<sup>33</sup> See *id.* at 103.

<sup>34</sup> See generally Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20 (1948).

<sup>35</sup> See S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

<sup>36</sup> See, e.g., RALPH NADER ET AL., *THE CASE AGAINST FREE TRADE: GATT, NAFTA AND THE GLOBALIZATION OF CORPORATE POWER* (1993); Joel P. Trachtman, *Reflections on the Nature of the State: Sovereignty, Power and Responsibility*, 20 CAN.-U.S. L.J. 399 (1994).

for institutionalization of international relations. There are two poles of institutionalization, intergovernmentalism and integration. Intergovernmentalism is simply a method of facilitating action by member states without binding them in advance to accept action. It provides a forum, an agenda, and perhaps a secretariat to support and precipitate action. It does not represent a transfer of binding decisionmaking power, although every bureaucrat knows that transferring this type of power can increase productivity. Integration, on the other hand, involves a pooling of decisionmaking power, or sovereignty. In institutional economics terms, intergovernmentalism is facilitation of the market of international relations, while integration is the creation of a "firm." These are different in degree, not in kind, but the differences are significant. With integration, decisive power is pooled or otherwise transferred and a governance mechanism is established to wield the decisive power. Obviously, integration may be deemed appropriate for some issues and not for others, and, as noted above, the scope of subject matter over which power is shared will be determined by, and will determine, the type of governance structure deemed appropriate.

Until relatively recently, the Westphalian system concerned itself largely with issues of war and peace — international political law as opposed to international economic law. These issues have seemed less conducive to integration than the low politics of international economic law, although the demonstration effect and spillover from integration in the economic sphere may advance integration in the field of high politics. As international economic law issues increasingly arise to challenge the Westphalian system, it is being transformed. Its basic concepts of sovereignty, of *domaine réservé*, of sovereign equality, and of territorial jurisdiction must be revised. This is the international economic law revolution.

## 5.2. *International Economic Law and International Economic Integration*

International economic law does not have a standard definition. Two leading scholars and practitioners, John Jackson and Ernst-Ulrich Petersmann, provide the following definitions:



Jackson:

This phrase can cover a very broad inventory of subjects: embracing the law of economic transactions; government regulation of economic matters; and related legal relations including litigation and international institutions for economic relations.<sup>37</sup>

Petersmann:

[International economic law] presents itself as a conglomerate of private law (including 'law merchant' and 'transnational commercial law'), state law (including 'conflict of laws') and public international law (including supranational integration law as in the EEC) with a bewildering array of multilateral and bilateral treaties, executive agreements, 'secondary law' enacted by international organizations, 'gentlemen's agreements' central bank arrangements, declarations of principles, resolutions, recommendations, customary law, general principles of law, de facto-orders, parliamentary acts, governments decrees, judicial decisions, private contracts or commercial usages.<sup>38</sup>

In these definitions, we can discern the international business law (including private international law)<sup>39</sup> topics discussed above. Also discernable is the public international law of multilateral and

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<sup>37</sup> Jackson, *supra* note 4, at 596.

<sup>38</sup> Ernst-Ulrich Petersmann, *International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 227, 251 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983); see also JACKSON, *supra* note 24, at 21-23.

<sup>39</sup> But see Georg Schwarzenberger, *The Principles and Standards of International Economic Law*, 1966 RECEUIL DES COURS D'ACADÉMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] I 7-11 (1967) (providing a definition of international economic law that excludes private law, but recognizing the overlap between private international law and public international law).

regional trade, or integration, which traditionally pertains to trade in goods, but combines its trade concerns with the regulatory concerns of international business law to attack other bulwarks of the *domaine réservé*, such as intellectual property regulation, competition law, investment law, environmental law, regulation of services, labor law, and, eventually, all other areas of business regulation. The international economic law system, however, does not present a full set of rationales for these types of regulation; the full set of rationales must first be articulated domestically.<sup>40</sup>

Competition among states, namely regulatory competition, is a central rationale for bringing these types of regulations to the international realm.<sup>41</sup> The resulting international economic law is fundamentally a law of competition which permits and forbids certain competitive acts in international trade. Implicit in the idea that this international economic law is a law of competition is the notion that there is a market in which this competition takes place. This is not the market among private producers of goods and services, but the market among states for public goods. States compete for jobs, wealth, and power, or rather, their governments compete for reelection by reference to their ability to secure jobs, wealth and power. The field regulated by international economic law is at the center of this competition. When states decide to regulate or restrain the competition, they cooperate to establish international economic law among themselves.<sup>42</sup>

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<sup>40</sup> Rationales, or goals, very clearly follow the principle of subsidiarity. They come from the lowest possible level, from the individual level. From a contractarian standpoint, each individual enters successively higher levels of social organization to achieve his or her goals more effectively than is possible alone, or at lower levels of organization. See, e.g., BRENNAN & BUCHANAN, *supra* note 1, at 19-32. Again, no particular level seems presumptively to merit responsibility, but as the scope of institutions available increases, a more accurate allocation of responsibility becomes possible. While individuals may have direct participation at different levels, e.g., citizens of Massachusetts participate individually (the electoral college aside) in U.S. national elections, they also may participate indirectly, e.g., national executives may determine positions taken in international organizations. This is the structural explanation of the "democracy deficit."

<sup>41</sup> The other important reason for international regulatory cooperation is international externalization, where adverse effects are imposed on citizens of other states. See generally Trachtman, *supra* note 30 (discussing regulatory competition and externalization among states).

<sup>42</sup> This is no different from the story of the emergence of regulation in domestic society: regulation emerges to limit competition, to say that there are

This conception of international economic law presents a view of the types of state actions that are permissible during competition. It prohibits many acts of protectionism and mercantilism. Yet, we have learned recently that the domain of potential protectionism and mercantilism is quite large. As tariff barriers and nontariff barriers to trade in goods have been reduced, less obvious differential applications of embedded legal and regulatory law have been used to form nontariff barriers not only to trade in goods, but to trade in services and investment. These nontariff barriers, however, have a dual character that makes them difficult to address. First, they are socially rooted, often democratically legitimated, structures that represent a domestic vision of how domestic society should be organized to achieve domestic values. Second, they are international trade barriers. The transformed perspective of international economic law, however, transcends this artificial bifurcation.

The transformed perspective of international economic law does not reject domestic values, it absorbs them. This transformed perspective recognizes that just as we must “think globally and act locally,” we must also think locally and act globally. Thus, domestic values can be maximized through international action. In this sense, all politics is domestic, at least in its origins. Increasingly often, however, it is necessary to enter the market of international relations to maximize domestic values, such as wealth, employment, and environmental protection. We may take the example of environmental concerns. Sometimes the best way to articulate environmental concerns and obtain a desired outcome is purely through local politics, which may affect the local environment or may be used to affect the global environment. At other times, it is more effective to engage in international politics in order to affect either the local environment or the global environment. From the private actor’s perspective, the question is one of strategy: how can I best achieve what I want? From the public policy perspective, the question is one of

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certain minimum standards of conduct. Sometimes regulation emerges to require the internalization of externalities. Regulation also may arise, however, to address pecuniary externalities: the harmful effects that may result from market competition itself. While economists seem to believe that in the long run, the benefits of international trade significantly outweigh the disruptions it occasions, governments generally decline to conform their policy to this theoretical insight.

institutional design: how can local and global institutions be designed to give people more of what they want? At least initially, this public policy perspective is that of local government. When local government recognizes that it can give people more of what they want by entering the market of international relations, presumably it will do so.

The problem of the relationship between trade and other societal values<sup>43</sup> may be referenced generically as the "trade and . . ." problem. The "trade and . . ." problem is similar to the tradeoff in domestic society between promoting allocation in the market, and the other social goals such as environmental protection, labor rights, worker safety, and securities antifraud. Consider further the example of environmental protection. In domestic society, a stereotypical business asks that the market be permitted to operate without environmental regulation, and a stereotypical environmentalist asks that the environment be left untouched. Both are wrong because society needs both a market and an environment; the only question is how much of each.<sup>44</sup> This is the question implicit in one definition of the term "sustainable development."

The conflict is replicated in international trade, with GATT/WTO acting as defenders of the market and the environmentalists playing their familiar role, globally instead of locally. This image may remind us that we live in a global community with roles both for the market and for environmental protection.<sup>45</sup> Sometimes, the values they embody seem inconsistent and we feel we are required to make a tradeoff between them.

This is a tradeoff, but not necessarily one between efficiency and inefficiency. It is not even a tradeoff between production and consumption, with market activity as the socially productive component and regulation as social consumption. Rather, it is first a tradeoff among the types of goods we want. Second, it is

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<sup>43</sup> See generally Steve Charnovitz, *The World Trade Organization and Social Issues*, 28 J. WORLD TRADE 17 (1994).

<sup>44</sup> See Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994) (arguing that institutions are needed that can address these issues in an integrated fashion).

<sup>45</sup> "[I]t is no longer possible to treat ecology and [the] international political economy as separate spheres." Andrew Hurrell & Benedict Kingsbury, *The International Politics of the Environment: An Introduction*, in THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 3 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

a basis for choosing among the types of institutions that can maximize our basket of goods.

Although the market is capable of providing environmental protection, labor rights, and benefits, most societies have implicitly decided that they are dissatisfied with the market's ability to provide these goods (there is no such thing as "market failure," only market relative inefficiency). A transaction costs analysis would assume that transaction costs prevent the market from providing the desired levels of these goods. In order to justify regulation, it must go one step further. It must find that the political process does a better job of producing the desired level of these goods.

Let us continue with the example of environmental protection. When we regulate, we decide implicitly through governmental structures that the mix of environmental protection and other goods provided by the market is insufficiently weighted in favor of environmental protection. According to this model, regulation is considered a more efficient way to get what people want because politics is a more efficient form of social organization than goods and services markets, *for these purposes*. This assumes a political process that is perfectly reflective of people's goals. Regulation is not, however, always the most efficient form of organization. It sometimes provides less of what we want. This might be termed "government failure," although this term should be rejected for the same reason we reject "market failure." Rather, this problem requires a comparative institutional analysis. The efficient choice, or combination, of social organization (including market organization) will be that which minimizes the sum of two costs: (i) deadweight loss due to failure to provide the optimal mix of environmental protection and other goods, and (ii) transaction costs in arriving at the final allocation. Our existential task, then, is to choose the least imperfect — the most efficient — institutional structure to achieve our goals.<sup>46</sup> We may mix institutional structures if doing so provides the most efficient means to achieve our goals.

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<sup>46</sup> The fact that we each have different goals presents some challenges to this analysis. The challenge is met, however, in the same way that any social contract is entered. Each decides to enter based on his or her own needs, and the increased ability to satisfy them in society. Where action alone, or at a lower level of social organization, can provide more, no rational decisionmaker would choose to move to a higher level of social organization.

Similarly, at the level of international society, the decisions of individual states regarding environmental protection and other social benefits are the decisions of the market. Free trade regimes establish this market, but again, a market is not necessarily the best method to obtain for people what they want. Cooperation in the form of *regulation of the way states regulate* may be necessary under certain circumstances. Sometimes, it is necessary to discipline national regulation through regimes of nondiscrimination, or, more intrusively, through regimes of proportionality, mutual recognition, or harmonization. These regimes may involve harmonization down, but also may involve harmonization up. Where they involve harmonization down, they are unlikely to mandate reduction of regulation, but only to provide that regulation at a higher level cannot be applied to foreign suppliers. Again, the optimal choice of international organization, including unregulated state autonomy, will be that which minimizes the aforementioned sum of two costs, deadweight losses and transaction costs.

The main distinction between the "trade and . . ." problem in international society and the market versus regulation problem in domestic society is one of institutional capacity and institutional choice. Within domestic society, we have market, legislative, regulatory, and judicial mechanisms that can make the tradeoff between, for example, environmental goods and other goods. We may differ on which institution can best formulate individual decisions.<sup>47</sup> If we determine that the market is not the appropriate mechanism, however, we may use a governmental institution to make the tradeoff.

In comparison, consider the international economic order, and the case of the GATT tuna panel in particular.<sup>48</sup> The GATT tuna case, the notorious first clash of environmental values with trade values, occurred when the United States enforced the Marine Mammals Protection Act<sup>49</sup> and imposed an embargo on certain tuna from a number of countries, including Mexico. While the

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<sup>47</sup> For the leading legal work on comparative institutional analysis, see generally NEIL KOMESAR, *IMPERFECT ALTERNATIVES* (1994).

<sup>48</sup> See General Agreement on Tariffs and Trade: Dispute Settlement Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991); see also General Agreement on Tariffs and Trade: Dispute Settlement Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994).

<sup>49</sup> See 16 U.S.C. § 1371 (1988).

reasons why the GATT dispute resolution panel held that the United States had violated GATT have been analyzed closely elsewhere and cannot be recounted here,<sup>50</sup> it is worth noting that the environmental community was furious with the decision. In their view, GATT had embarked on an attack on environmental protection. GATT was merely ignorant of environmental considerations, however, and the unfortunate dispute resolution panel had little choice but to apply the GATT law as they saw it.

There were several reasons for GATT's pre-1991 ignorance of the environment. First, GATT had no environmental brief. When GATT was established in 1947, protection of the environment was not such a large concern and the relationships between trade and the environment were not recognized. Second, GATT had little in the way of legislative capacity. It could not itself make new rules regarding the tradeoff between the environment and the market.<sup>51</sup> Third, GATT's dispute resolution procedures did not provide opportunities for the submission of *amicus briefs* or other input from nongovernmental organizations that domestic courts in the United States allow. These three failures added up to a single problem, the failure to link different issues that were important to people and to make tradeoffs between them. Additionally, there was a failure to have institutions that can efficiently make these tradeoffs.

#### 6. SPILLOVER INTO CONSTITUTIONAL FUNCTIONS: INTERNATIONAL ECONOMIC LAW AND INTERNATIONAL ORGANIZATION

As states cooperate more densely, they may find it worthwhile to create institutions to facilitate or enhance cooperation. By institutions, I mean any device that constrains future choice, that constrains some component of politics over some period of time, including rules that have some binding effect, and including formal institutions such as the WTO, the European Union, and their legislative, judicial, and executive components.

These institutions can be explained in transaction cost terms, and in related game theoretic terms. The transaction cost

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<sup>50</sup> See, e.g., Joel P. Trachtman, *United States — Restrictions on Imports of Tuna*, 86 AM. J. INT'L L. 142 (1992).

<sup>51</sup> While it was technically possible for GATT to do so through its waiver or decision process, these were not viewed as politically viable.

explanation of institutions is based on Coase's transaction cost explanation of firms,<sup>52</sup> which argues that institutions are created because they allow efficient transactions to take place at a lower transaction cost than if the transactions took place in the market. In the context of international economic organizations, states would presumably be better off if they could agree not to engage in certain categories of protectionist or mercantilist behavior, or if they could coordinate their business regulation in particular ways. They might not agree to do so, however, for a number of reasons. Perhaps they do not have effective means of communication, they lack means to monitor one another's conduct, or they have inadequate means to enforce an agreement. These problems may be described in transaction cost terms, *i.e.* it is too expensive to communicate with, monitor, and enforce an agreement. Assuming these problems, the international trade context may be modeled as a prisoner's dilemma. The solution to the prisoner's dilemma is to establish means to communicate with the other player and to bind and monitor the other player's behavior. Of course, these solutions can be used only to the extent that they are less costly than the loss from failure to agree and less costly than "market"-type solutions to the same problems (by "market"-type, I mean transactions effected without institutions).

As more subject matter is addressed in international contexts, it may be more appropriate to establish international institutions to facilitate agreement and maximize the benefits of agreement. While extensive institutionalization might not be efficient in a single functional area such as securities regulation,<sup>53</sup> as the number of functional areas is multiplied to include all services, or an even wider area including goods, services, and intellectual property, it may well be more efficient to create institutions. Furthermore, the inclusion of multiple areas in common institutions may provide benefits in terms of the ability to exchange, and the ability to require compensation for breach, as well as economies of scale and economies of scope.

As the GATT tuna case illustrates, it is necessary to recognize

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<sup>52</sup> See Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), reprinted in RONALD COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988).

<sup>53</sup> See generally Joel P. Trachtman, *Unilateralism, Bilateralism, Regionalism, Multilateralism and Functionalism: A Comparison with Reference to Securities Regulation*, 4 *TRANSNAT'L L. & CONTEMP. PROBS.* 69 (1994) (discussing the institutional aspects of international cooperation in securities regulation).



the linkage among various issues, and to make any tradeoffs in a conscious and legitimate manner. As more issues that were previously part of the *domaine réservé* are addressed in the international sphere, international institutions will be required to replicate some of the functions otherwise performed by domestic institutions. These functions include, most importantly, sensitivity to the wide range of social issues that need to be integrated in any decision. The international sphere heretofore had the luxury of engaging in single-issue analysis. It has not needed to engage in significant tradeoffs among social issues, especially where the issues were part of domestic jurisdiction. Increasingly, we recognize that the world is interconnected not only geographically, but also functionally. Thus, it has become necessary for institutions — judicial, legislative, and executive — to be able to address issues such as trade and the environment in an integrated fashion.<sup>54</sup> No society can afford to make decisions in an unintegrated fashion.

Legislative institutions raise the greatest issues of sovereignty and democracy. International legislation will be viewed as lacking sufficient legitimacy until it can be said to be sufficiently democratically produced. In reality, however, the democracy deficit is a deficit of *direct* democracy, assuming that the executives of member states are democratically elected.

On the other hand, each “trade and . . .” problem may be viewed as a legislative problem requiring legislative institutions to address it. Of course, it might be decided that international cooperation in the particular subject area is not worthwhile, that competition is more valuable than cooperation in that area, or that the costs of cooperation are too high. It may still be appropriate, however, to create legislative institutions to make this “subsidiarity” or “level of governance” decision. (This assumes a decision to allocate the competence - competence decision to the international body, a decision which itself may warrant significant analysis.) If substantive legislation at the international level is valuable, legislative institutions are needed to produce the legislation.

As noted above, the design of legislative institutions will be

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<sup>54</sup> The choice among these types of institutions is an important comparative institutional analysis question. See generally KOMESAR, *supra* note 47 (explaining comparative institutional analysis in this context).

interdependent with the scope of competence accorded the legislative institution. With limited competence, more integration may be more easily accepted because sovereignty may be relinquished in narrowly defined areas. With expanded competence, national governments may determine to engage in more intergovernmental types of institutionalization and avoid relinquishing a veto over decisions.

Judicial institutions address the risks of auto-interpretation, determining the facts, and the application of law to facts, thus diminishing the possibility of defection through inappropriate interpretation of the agreement. They thereby make agreements more binding and, therefore, more attractive. Of course, strong judicial institutions raise concerns of sovereignty, especially where adjudication may be difficult to distinguish from legislation. As noted above, they also may raise concerns that the law has grown too strong, too brittle, and that it has overwhelmed and frozen the political process.

A related type of institutionalization does not involve the creation of organs, but relates to the relationship of rules created by international institutions to rules created by states. I refer to emblems of constitutionalization such as supremacy, preemption, direct effect, and judicial review. This essay cannot address these features in detail, but it is important to note that these features determine the binding character and uniformity of international law, and are an important feature in the design of international institutions.

#### 7. MANAGING THE INTERNATIONAL ECONOMIC LAW REVOLUTION: ALLOCATIVE EFFICIENCY AND REDISTRIBUTIVE CONCERNS

"Economic" motivations — motivations to maximize the things we value — sometimes lead us to cooperate with each other. This cooperation often will take legal or institutional form. International economic law transcends international business law and serves as the focal point for the construction of the institutions which govern international society and international law in general. The international economic law revolution provides the basis for a new constitutional era in international law. This is not an era for a single metropolitan ark,<sup>55</sup> but for

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<sup>55</sup> See Kennedy, *supra* note 32 and accompanying text, at 103.

a cosmopolitan Dunkirk: a jury-rigged fleet comprising a wide array of different forms of social organization, relating to one another in various ways, both vertically and horizontally, and adapting to new circumstances whenever appropriate.

The economic perspective is open to institutional competition through experimentation and survival of the most efficient. While a degree of institutional homogeneity, horizontal cooperation among institutions, may be justified in order to promote communications and understanding among institutions, such homogeneity must be weighed against the utility of diversity and competition.

The reader may be concerned that this essay's efficiency perspective does not respond to questions of redistributive politics. Indeed, the politics of the new international economic order, of explicit redistribution, have receded to cries of "trade not aid."

Redistribution today can be effected on two bases, each fully consistent with allocative efficiency. First, it can be effected in the form of side payments to induce developing countries to accept a higher standard of regulation than they might otherwise accept. Greater opportunities for transactions (here not in goods or services, but in public goods), due to greater scope of coverage, may allow poorer countries the opportunity to realize the value of their assets. For example, in the Uruguay Round of GATT, developing countries were able to exchange greater protection for intellectual property and greater access for foreign service providers for greater access for textiles, agricultural products, and tropical products. Free trade in public goods enhances values on both sides and results in more efficient outcomes. These outcomes include greater freedom of trade in goods and services. This, too, should operate to the benefit of people in developing countries, resulting in greater homogenization of incomes over time.

Second, redistribution through institutional politics, based on community, solidarity, or safe streets kinds of motivations can take place in international society, albeit to a lesser extent than in a domestic society.<sup>56</sup> Perhaps this is natural. All politics is *relatively* local, and solidarity and community do seem to dissipate

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<sup>56</sup> Even in domestic society, the political possibilities for redistribution may be more limited than often imagined. See BRENNAN & BUCHANAN, *supra* note 1, at 112-34.

over geographic or cultural space. Neighbors seem to help neighbors more than they help strangers, presumably for entirely rational reasons relating to expectations of reciprocation. Part of the project of the European Union, however, has been to try to extend feelings of concern beyond the state to fellow Europeans: converting strangers to neighbors. In fact, the analysis of this essay would indicate that redistribution is simply another good. Where a particular society wants more of it, it will vote for it. There are many reasons for what we know as "altruism," but all of them may be viewed, broadly, as enlightened self-interest.

#### 8. SYNTHESIS: THE INTERNATIONAL ECONOMIC LAW REVOLUTION

This essay began by showing the difficulties with and limitations of the terms "private international law," "international business law," and "public international law." These difficulties and limitations are addressed by international economic law. International economic law is the universal solvent, piercing and transcending these traditional categories, and also piercing and transcending some of the traditional constitutional underpinnings of the international system.

The international economic law revolution described here is most importantly a revolution in international law. It is a transformation of society that draws from and contributes to intensified relations among states, which in turn draws from and contributes to increasing possibilities for institutionalization of these relations (although the degree of institutionalization desirable will vary). This process is driven by several facts. First, each state's domestic legal system and regulatory structure has an intended or unintended effect on each other state, either in terms of externalities or in terms of competition. Every field of business regulation is a trade issue, and trade is dependent on every other area of business regulation. This fact is analogous to the fact in domestic society that every field of business regulation affects the market and the market is dependent on every area of public policy. In domestic society, we have legislative, judicial, and executive institutions to make decisions regarding how much regulation we want, and how much market allocation we want. In international society, these institutions are in a formative stage.

With the intensification of economic relations has come the recognition that these relations can be facilitated, or made more efficient, by increased regulatory transactions between states in the

area of international trade law and business regulation. These regulatory transactions take the form of agreements regarding issues perceived as barriers to trade, including agreements regarding regulatory jurisdiction, agreements regarding standards for treatment of foreigners or their things, agreements for disciplining regulatory jurisdiction through rules of proportionality, and agreements regarding harmonization of law. These regulatory transactions can take place in the “market” for public goods, where states enter into “spot” transactions for regulatory cooperation. In addition, regulatory transactions may be facilitated by the development of institutions. These institutions can allow greater communications, a wider scope for exchange, increased binding power, and greater possibilities for enforcement. They may resolve the prisoner’s dilemma often used to describe states in a trading relationship. They are by no means always useful, however; under many circumstances, the market of international regulatory competition will provide us more of what we want.

Thus, despite the potential benefits of institutionalization, we should not create international economic law and institutions simply for the sake of building arks. We should not cooperate for cooperation’s sake. Rather, we should cooperate when cooperation helps us to get more of what is good.<sup>57</sup>

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<sup>57</sup> See, e.g., BRENNAN & BUCHANAN, *supra* note 1, at 6 (“[T]he rules that constrain sociopolitical interactions — the economic and political relationships among persons — must be evaluated ultimately in terms of their capacity to promote the separate purposes of all persons in the polity.”).